No. 95-1184

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, Secretary of Agriculture,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.;
KOBASHI FARMS, INC.; TANGE BROS., INC.;
NAGAO FARMS; NILMEIER FARMS;
CHOSEN ENTERPRISES;
GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS;
KOBASHI FARMS' NAKAYAMA FARMS, INC.; and
MIHARA FARMS,
Respondents.

**On Writ of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble[.]"

STATEMENT

Statute and Regulation Background

This case presents a First Amendment challenge to compelled advertising of California peaches, plums, and nectarines. The advertising arises under marketing orders covering specified agricultural commodities promulgated by the Secretary of Agriculture pursuant to his authority under the Agricultural Marketing Agreement Act of 1937, as amended (AMAA). 7 U.S.C. 601, *et seq.* Respondents are forced to fund and be associated with advertising messages that they disagree with — on commercial, economic, moral and ideological grounds — purportedly to serve the collective of the California tree fruit industry.

Respondents grow, pack, and market peaches, plums and nectarines from four counties in California's Central San Joaquin Valley. App. 3a; Opp. 119a.[1] Most have extensive experience growing and marketing these stone fruits. Wileman Bros. & Elliott, Inc., for example, has handled nectarines and plums since 1948. Kash, Inc. has handled peaches, plums, and nectarines since 1968. Opp. 11a. These commodities are regulated by the Marketing orders issued under the discretionary authority within the AMAA — which does not require the secretary to regulate anything. The AMAA's purpose is "to establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602(1). The AMAA allows the Secretary to promulgate marketing orders regulating,

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[1] "App." denotes the appendix to the petition for certiorari. "Opp." denotes the appendix to the opposition to the petition.

inter alia, minimum maturity and size of specified commodities. *See*, 7 U.S.C. 608c(6)(H).

Committees consisting of respondents' competitors administer the marketing orders. See, 7 U.S.C. 608c(7)(C), 610; 7 C.F.R. 916.20, 917.20; App. 96a-98a. To fund the marketing orders, assessments are imposed on processors, associations of producers, and others engaged in handling the regulated fruit, all of whom are referred to in the AMAA as "handlers." 7 U.S.C. 608c(1), 610(b)(2)(ii). Violations of marketing orders carry civil forfeiture and criminal penalties. 7 U.S.C. 608a, 608c(14). Respondents directly compete with the entire tree fruit industry, including committee members, for buyers, brokers, and other growers.

A 1954 AMAA amendment authorized marketing orders "[e]stablishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order." 7 U.S.C. 608c(6)(I). This amendment was a small part of the Agricultural Act of 1954. See, H.R. Rep. No. 1927, 83rd Cong., 2nd Sess. (1954), *reprinted in*, 1954 U.S.C.C.A.N. 3399, 3427.[2]

In 1958 the Secretary promulgated marketing order 916 for California nectarines. 7 C.F.R. 916. In 1959 the Secretary promulgated marketing order 917 for California peaches, plums, and pears.[3] 7 C.F.R. 917.

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[2]That Act did not authorize a compelled advertising program, but instead focused on one year price supports for specific crops, not at issue here, because of over production caused by government requests during WWII and the Korean conflict.

[3]The federal plum marketing order was terminated by the Secretary in 1991. App. 5a, n.1. As the Secretary notes, the compelled advertising of plums is not moot since respondents seek a return of assessments used to advertise plums. The pear provisions are not at issue.

In 1962 authority for a marketing order allowing cherry advertising was added to 7 U.S.C. Section 608c(6)(I): "*Provided*, That with respect to orders applicable to cherries such projects may provide for any form of marketing promotion including paid advertising[.]" Pub. L. 87-703, 76 Stat. 632, Sept. 27, 1962. This provision was added in conference with amendments to the Farmers Home Administration Act of 1961. Conf. R. No. 2385, Sept. 17, 1962, *reprinted in*, 1962 U.S.C.C.A.N. 2700. No explanation or discussion appears in the legislative history.

In 1965 language was added to 7 U.S.C. 608c(6)(I) giving the Secretary authority to set up advertising of plums and nectarines. Pub. L. 89-330, 79 Stat. 1270, Nov. 8, 1965. The legislative history at best consists of a letter from the Acting Secretary to the House Agriculture Committee Chair explaining that the AMAA authorized a marketing order including cherry advertising, but the cherry marketing order did not provide for advertising, "[t]herefore, [USDA did] not [have] any experience in the operation of an advertising program under marketing . . . orders." H.R. Rep. No. 846, 89th Cong. 7th Sess. (1964), *reprinted in*, 1965 U.S.C.C.A.N. 4142, 4144. The House Report notes that the AMAA did not originally provide for advertising, but goes on to state that when Congress was asked for ". . . authority to provide for such activities [under marketing agreements] it has always been granted." 1965 U.S.C.C.A.N. 4143. The following year the Secretary amended marketing order 916 to provide for committee authority to advertise nectarines. 7 C.F.R. 916.45.

In 1971 Congress gave the Secretary authority to set up advertising of California-grown peaches. Pub. L. 92-120, 85 Stat. 340, Aug. 13, 1971. The Acting Secretary wrote that "We anticipate increased effort by the fruit and vegetable industries to obtain means of financing the advertising and promotion of these commodities in the marketplace [and] the [AMAA] could provide the facility for this purpose."

S.R. No. 92-295, 92nd Cong., 1st Sess. (1971), *reprinted in*, 1971 U.S.C.C.A.N. 1406, 1407. Also in 1971, the Secretary amended marketing order 917 to provide for committee authority to advertise plums. 7 C.F.R. 917.39. In 1976 the Secretary amended marketing order 917 providing for committee authority to advertise peaches. 7 C.F.R. 917.39.

The committees, consisting of respondents' competitors, control and carry out all aspects of the compelled advertising program including the nature, content, and distribution of the messages. App. 4a, 8a. Each year the committees submit to the Secretary expenses and assessment rates the committees estimate for each commodity. 7 C.F.R. 916.31(c), 917.35(f). The Secretary authorizes the expenses and assessments by publication in the Federal Register. Meanwhile, assessments are imposed on every box of peaches and nectarines (and plums until 1991) packed in the San Joaquin Valley. 7 C.F.R. 916.40, 916.41, 917.36, 917.37. The assessments total approximately 10 to 12 million dollars annually. Approximately 53 percent of these assessments fund the compelled advertising and promotion budget. App. 8a, n.3. Although thirty-three states commercially handle peaches, twenty-eight handle nectarines, and twenty-six handle plums, only California handlers are forced to pay for so-called generic advertising. App. 21a.

Litigation History

Respondents Wileman Bros. & Elliott, Inc. and Kash, Inc. filed administrative petitions in 1987 with USDA, pursuant to 7 U.S.C. section 608c(15)(A), challenging certain aspects of the marketing orders governing California nectarine and plum maturity regulations from 1980-1987[4] Following a nine-day

[4]Beginning with the 1987 harvest season Wileman/Kash paid their assessments into an attorney-client trust account. The U.S. Attorney's office filed collection actions in the United States District Court, Eastern District of California. District Court Judge Edward D. Price ordered the assessments, and all assessments for future harvest seasons, retained in trust pending final disposition of the case. App. 7a. Approximately six million dollars in assessments is presently in trust.

hearing, USDA Administrative Law Judge (ALJ) Dorothea A. Baker ruled in favor of Wileman/Kash. In 1988, Wileman/Kash again challenged the marketing order regulations. The second petition incorporated challenges to the peach marketing order (7 C.F.R. 917) maturity regulations and the compelled advertising program for nectarines, plums and peaches. Respondents sought refund of assessments imposed since 1980. Following 19 days of testimony, ALJ Baker ruled in favor of Wileman/Kash, and in dicta analyzed the compelled generic advertising program finding it unconstitutional under *U.S. v. Frame*, 885 F.2d 1119 (CA3 1989). Opp. 362a393a.[5] In the interim, the remaining fourteen respondents each filed 7 U.S.C. 608c(15)(A) administrative petitions making similar challenges.

USDA's Judicial Officer (JO) subsequently issued decisions overruling both of ALJ Baker's decisions. App. 5a, 7a. Wileman/Kash sought review of agency action in District Court. 7 U.S.C. 608c(15)(B). The parties stipulated that all respondents would rise or fall on the Wileman/Kash complaint, and the District Court heard cross-motions for summary judgment. USDA argued *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980) was controlling, and that *Abood v. Detroit Bd. of Ed.*, 431

[5]ALJ findings are part of the record evidence to be weighed against the agency. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (CA9 1984). ALJ Baker made extensive findings in her decision. Opp. 119a-204a. USDA contended constitutional issues were beyond the ambit of a (15)(A) proceeding at the time of ALJ Baker's decision, leaving respondents (and the ALJ) in the catch-22 of failure to exhaust administrative remedies if they went directly to district court. See, *Saulsbury Orchards and Almonds Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1193, n.2 (CA9 1990). Though ALJ Baker discussed the First Amendment in dicta toward the end of her opinion (Opp. 340), she wove in her initial findings testimony and evidence she heard and received related to First Amendment issues.

U.S. 209 (1977) and its progeny had no application to a government-mandated, commercial advertising program. Opp. 2a. The District Court, relying on *Frame*, 885 F.2d 1119, ruled for USDA concluding that although the compelled advertising program "implicates the First Amendment rights of handlers forced to participate, [it] was enacted in furtherance of an ideologically neutral compelling state interest, and infringes on their rights to a minimum degree no more than necessary to achieve the stated goal." App. 91a-92a. The District Court consolidated all respondents for judgment and appeal.

Respondents appealed to the Ninth Circuit. USDA again argued *Central Hudson* was controlling. The Court of Appeals invalidated the compelled generic advertising program. The Court ruled that under *Central Hudson* the mandatory program did not directly advance USDA's asserted interests and was not sufficiently narrowly tailored. USDA petitioned for rehearing, requested rehearing *en banc*, arguing that the Ninth Circuit erred by relying on *Central Hudson*, rather than the *Abood* line of cases.[6] The Ninth Circuit did not

[6]It is beyond peradventure USDA took the opposite position in the courts below. Opp. 2a, 5a, 8a n.2. Consistent with the Court's admonishments respondents raised this issue at the petition stage. Whether the "germaneness" test derived from *Abood* and its progeny may be applicable to compelled advertising is a question that the Secretary presses too late. "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn v. United States*, 355 U.S. 339, 362 (1958). The Secretary argued on petition that the Ninth Circuit's decision could not be squared with the National Beef Promotion Act's survival of scrutiny in *Frame*, 885 F.2d 1119. No discord exists, however, because the Third Circuit found it unnecessary to apply *Central Hudson* to *Frame's* free speech challenge since an overwhelming Congressional record supported the Beef Promotion Act under heightened scrutiny, while the Ninth Circuit subsequently found the fundamentally different compelled advertising of California peaches, plums, and nectarines failed the less burdensome *Central Hudson* test based on lack of evidence. *See, Frame*, 885 F.2d at 1134, n.12; *Cf. Cal-Almond v. Dept. of Ag.*, 14 F.3d 429, 434-436 (CA9 1993) (heightened scrutiny need not be applied because forced almond advertising failed the less rigorous Central Hudson test).

order a response and denied the petition. App. 38a-39a. The Secretary petitioned this Court for certiorari and on June 3, 1996, this Court granted the petition. 116 S.Ct. 1875.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Solicitor requests this Court review a compelled advertising program which the government would have this Court believe is neutral, "generic," and works to the benefit of California peach, plum and nectarine growers and handlers, with minimal incursion on respondents' First Amendment rights. That is not the advertising program at issue.

In reality, less than 50 percent of millions of dollars in advertising assessments are utilized for television and radio advertisements promoting "eat California fruit." The remaining advertising dollars are utilized on promotional materials which promote specific varieties, often times limited to only a few handlers. There are over one hundred varieties *each* of peaches, plums and nectarines. Respondents necessarily only grow a few of these varieties. More often than not, the promotional material promotes specific varieties that tend to be sold by growers involved in the promotional activities — the committee members — who are competitors of respondents. As a result, the larger percentage of the assessment dollar which respondents are forced to contribute to the advertising program is directed to promoting specific varieties of peaches, plums and nectarines which respondents do not grow or handle. Often times, respondents are forced to pay for advertising specific varieties of peaches, plums and/or nectarines that are proprietary varieties of a single handler, which respondents are not entitled to plant, grow or sell.

Throughout this entire litigation, respondents have sought to determine what the Secretary's interest is in compelling handlers of fruit in only five counties in central California to finance a nationwide advertising program — when the same commodities are commercially grown in the majority of the states within the United States. The stipulated trial record fails to reveal that any problem unique to California peach, plum and nectarine growers exists.

Although California's "generic" advertising program is discretionary with the Secretary, not once in the over 20 years that the Secretary has reviewed and approved the annual program, has a problem been identified. Not once has the Secretary conducted any studies which demonstrates that the compelled advertising program is of any benefit to the California peach, plum and nectarine grower. Nowhere in the stipulated trial record is there evidence that the compelled advertising program works better than private enterprise.

Instead, all that can be established is that the Secretary forces respondents to spend their advertising budget on a program not designed for their benefit. It takes money from respondents that could be used to otherwise advertise their own varieties over those of their competitors; while at the same time using respondents' assessment dollars to promote their competitors' own varieties.

Regardless of the level of scrutiny applied in evaluating the Secretary's interest in requiring California peach, plum and nectarine growers to finance this advertising program, the Secretary's claimed interest cannot override respondents' constitutionally protected speech and associational freedoms: (i) The Secretary has identified no existing problem; (ii) the Secretary has not established that either a "compelling" interest or "substantial" interest exists in rectifying the unidentified problem; (iii) the Secretary has provided no evidence that the cure the government has

chosen (i.e., compelled advertising) works to alleviate the problem, or in fact, is not itself the problem.

Respondents show in section I that the government has never demonstrated a genuine need or identified a problem to justify the need for compelled advertising. In addition, under *Central Hudson* the record evidence proves that no substantial interests are directly advanced in a manner no more extensive than necessary. In section II, respondents show that compelled advertising is presumptively invalid under the compelled speech rubric, and fails strict scrutiny applied to interference with expressive association rights. In section III, respondents explain the test urged by the Secretary does not apply here, but regardless, compelled advertising fails that test as well.

LAW AND ARGUMENT

I. Compelled Advertising Fails Scrutiny Under The *Central Hudson* Commercial Speech Standard

After arguing that the "germaneness" test from the *Abood* line of cases applies, the Secretary argues that nothing in *Central Hudson* undermines compelled advertising. Pet. Brf. 34. Under *Central Hudson*, regulation impacting protected commercial speech rights must be supported by a substantial government interest which is directly advanced in a manner no more extensive than necessary to serve that interest. 447 U.S. at 566. The record evidence here shows no substantial interests are directly advanced in a manner no more extensive than necessary.

A. The Government's Asserted Interests In Enhancing Grower Returns, And Avoiding Free Riders And Underadvertising Are Not Substantial

The first step under *Central Hudson* is to identify with care the asserted government interest. *Edenfield v. Fane*, 507, U.S. 761, 768 (1993). That interest must be "substantial." *Central Hudson*, 447 U.S. at 566. The Secretary

multiplies his interests as the case progresses, but taken together or individually none support compelled advertising. Before the ALJ and the JO, the Secretary argued compelled advertising was designed "only to encourage the purchase of peaches, plums, and nectarines." Before the Ninth Circuit, the Secretary argued USDA has a substantial interest in enhancing returns to California peach, plum, and nectarine growers, thus, the goal of compelled advertising is to convince consumers to buy California stone fruit; the Secretary added that USDA has an interest in avoiding free riders who would somehow benefit should the government's compelled advertising program be discontinued. The Secretary repeats these assertions here adding that compelled advertising aims to increase overall market, while individual advertising is insufficient because its intent is to give the particular advertiser a bigger share of market. Pet. Brf. 38-39.

At bottom, the Secretary's assertion of interests and problems sought to be rectified comes down to an unimportant, unsubstantiated concern about underadvertising that ostensibly would occur without compelled advertising. When the governments seeks to defend regulation impacting protected speech as a means of redressing past harms or preventing anticipated harms it must do more than posit the existence of a disease sought to be cured, because even if a regulation is otherwise permissible in the face of a given problem that regulation may be highly capricious if the problem does not exist. *Turner*, 114 S.Ct. 2445, 2470 (1994) (government must show local broadcasting in genuine jeopardy and in need of requiring cable TV to devote channels to local stations). After telling Congress in 1965 that USDA had no experience in advertising under the marketing orders (*supra*, 4), and after promulgating amendments to the marketing orders back in the 1960's and 1970's allowing the committees to initiate compelled advertising, the Secretary has yet to establish that the industry is in genuine jeopardy and/or in need of compelled advertising.

Nothing in the record supports the Secretary's supposition that underadvertising of California peaches, plums, and nectarines, or decreased demand, or genuine jeopardy will exist without the government forcing an advertising program on the California stone fruit industry. The Secretary's arguments are nothing more than post hoc rationalizations.

Beyond failure to demonstrate a genuine problem justifying a need for compelled advertising, the government's posited interests are not substantial. The record does not reveal what the Secretary means by "enhance" grower returns. Juxtaposed with assertions alluding to increase in consumption and total market, the Secretary apparently assumes increased production equates to increased profits. The record presents no evidence, whatsoever, on whether increased production increases or decreases growers' profit margin. Regardless, however the Secretary defines or measures enhancement of grower returns as an identified interest, it cannot be supplanted with other suppositions. *See, e.g., Edenfield v. Fane*, 507 U.S. at 768. ("[T]he Central Hudson standard does not permit us to supplant the precise interests put forward by the State with other suppositions.")

An ambiguous asserted goal of "enhancement" of grower returns does not qualify as substantial. Enhancing returns to only California growers of peaches, plums, and nectarines when so many other states have growers producing identical commodities leads to the conclusion that the government could claim a substantial interest in enhancing returns to any discrete economic cluster, making the concept of substantial interests meaningless, particularly where, as here, the record does not demonstrate a principled distinction explaining why the Secretary seeks to enhance returns for California growers through compelled advertising but not for growers in other stone fruit producing states. The Secretary simply begs the question and asserts that because California dominates the national markets for peaches, plums, and nectarines, California handlers and growers "'stand to reap

most of the benefits" of increased sales. Pet. Brf. 31. *Cf., Frame*, 885 F.2d at 1181-1182 (Sloviter J., dissenting) (government interest neither compelling nor substantial when forced advertising messages represent economic interest of one segment of population).

The Secretary does not claim that an increase in overall demand is a "substantial" interest, but he posits this aim avoids adverse market conditions associated with reduced demand. Pet. Brf. 38. Nothing in the record points to any evidence that adverse conditions due to decreased demand has or will exist without compelled advertising. On the other hand, the record evidence affirmatively demonstrates that the advertising program has been manipulated to provide for promotion of select, discrete varieties — not the overall market. Moreover, the AMAA was not intended to control production. *See*, 50 Stat., Ch. 296, p. 247, June 3, 1937; 7 USC 608c(10). At best the AMAA only gives the Secretary ability to use marketing orders to limit a flooding of the market with particular commodities at a given time. 7 U.S.C. 608c(6) [order may provide for limiting total quantity of commodities, which have been produced, which may be marketed or transported during specified period].[7] Yet production is just what the Secretary necessarily seeks to control by increasing the overall demand.

The purported interest in avoiding free riders, on which the Secretary places almost talismanic reliance, is not the vital policy interest that it is in the union context. See, part III. Under the Secretary's reasoning, free riding is a concern to be remedied in connection with virtually any industry or individual advertising. The same imagined concern about free riding could be used to justify compelled advertising of products from every conceivable regulated industry. Whether voluntary collective advertising or individual advertising would allow others to "free ride" by not participating or engaging in their own individual advertising cannot justify compelled advertising.

[7]The marketing orders at issue do not contain such quantity limiting provisions.

The Secretary cannot point to any substantial interest that warrants compromising First Amendment principles with compelled advertising. Advertising stone fruit must not be placed in the same category as health, safety and other arguable legitimate governmental interests. If advertising stone fruit is a "compelling" or "substantial" governmental interest, then what is not a substantial governmental interest? Advertising products in any industry could be mandated by the government in an effort to overcome the consumers' supposed lack of interest in that particular product.

B. The Government's Asserted Interests Are Not Directly Advanced By Compelled Advertising

Under *Central Hudson*, the Government carries the burden of showing that the challenged regulation advances the government's interest in a "direct and material way."[8] That burden is not satisfied by mere speculation and conjecture. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1592 (1995). The record evidence defeats the Secretary's arguments regarding achievement of the asserted goals of enhancing grower returns, increase in total market, avoiding free riders, and the alleged underadvertising that would occur without compelled advertising.

1. Compelled Advertising Does Not Directly Advance The Asserted Interest In Enhancing Grower Returns

The government's assertion of an interest in enhancing only California peach, plum, and nectarine grower returns

[8]Moreover, wholesale compelled advertising should at least be required to "significantly" advance a substantial interest, just as wholesale suppression of advertising must do. See, *44 Liquormart, Inc. v. Rhode Island Liquor Stores*, 116 S.Ct. 1495 (1996).

through compelled advertising need not detain us since it has failed to accomplish that goal to *any extent*. As noted above, the Secretary granted the committees authority to engage in forced advertising beginning in 1966 for nectarines, plums in 1971, and peaches in 1976. The committees' management committee chairperson testified that, since he had been on the committees, beginning in 1971, the industry pays more each year for the same level of advertising, but nonetheless the growers' economic position has not improved — growers may even make less now than in 1971. See, App. 19a; W/K-II, R.T. 1293-1295.

2. Compelled Advertising Does Not Directly Advance The Asserted Interest In Increasing Total Market But, Instead, Is Utilized By the Committees To Promote Select, Discrete Varieties Of Stone Fruit

At trial, USDA relied on its trial exhibit 297, without reference to any specific document, as the record evidence supporting compelled advertising of peaches, plums, and nectarines. Opp. 134a, ¶ 59. Trial Exhibit 297, covering the years 1980 to 1989, consists primarily of commodity committee meeting minutes, proposed committee budgets, assessment rates, and a few USDA memoranda. The ALJ found no evidence which supported any of the rhetoric of the Secretary that the documents in USDA's trial exhibit 297 were reviewed before the Secretary authorized the commodity committees' expenses and approved implementing the so-called "generic" advertising each season. Opp. 336a. The ALJ concluded that "it may well be true that such documents were available but no witness indicated that he reviewed all of these documents and made certain judgmental determinations with respect thereto." Opp. 339a.

A review of the contents of USDA's trial exhibit 297 reveals nothing supporting compelled advertising. For example, since 1980 the Secretary merely rubber stamped the

committees' budgets and assessment rates.[9] The committees met each year and came up with a budget and an assessment rate for each regulated commodity. The budget was sometimes outlined in a document called "California Stone Fruit Projects." JA 265, 289, 302, 338. There was usually a memorandum addressed to the USDA fruit and vegetable division director recommending approval of the California Stonefruit Budgets. JA 271, 277, 280, 293, 308, 313, 315, 318, 330, 345, 358, 369, 378, 484, 485, 498, 500. These memoranda categorized the items on which the money would be spent and advised whether expenditure, based on crop size, was going to be increased or decreased compared to the previous year. *Id.* Rules, without prior notice and/or opportunity to comment, appeared in the Federal Register authorizing the fiscal year expenses and assessment rates that the committees wanted.[10] JA 284, 323, 327, 334, 351, 362, 366, 370, 374, 382, 487.

The Secretary claims this "prior approval" of a budget enables industry members to plan their own advertising efforts. Pet. Brf. 42, n. 23. This cannot be based on record evidence. The ALJ found: "It is undisputed, and the evidence clearly shows, that a very substantial percentage of the tree fruit harvest season was completed prior to the issuance of the assessment [regulation]. In other words, fruit was picked and packed prior to the effective date of each years' assessment regulations." Opp. 340a. "A review of the Secretary's assessment regulations from 1979 through 1989 establishes their retroactivity and, also, that, through the last decade,

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[9]The Ninth Circuit correctly reasoned that the Secretary must rely on current information since the Secretary continually approved annual committee budgets and assessment rates. App. 10a-11a.

[10]On June 16, 1988, after respondents had filed petitions challenging the marketing orders, the Secretary issued, for the first time, a proposed rule regarding the estimated assessment rates, and an opportunity for comment. Opp. 159a.

virtually the entire advertising budget was expended well before the Secretary authorized any expenses to be incurred or assessments collected." Opp. 339a-340a. A close look reveals that this record is mostly an exercise in pushing paper. For example, the Secretary published notice in the Federal Register on August 10, 1981 authorizing the commodity committees' expenses and assessment rates for fiscal year ending February 28, 1982. The internal USDA memorandum to the director of the fruit and vegetable division recommending approval of the committees' expenses and assessment rates, however, is dated over one month after the Secretary approved the expenses and assessment rates. JA 293.

Faced with this untenable record, the Secretary begins with a notion that advertising is assumed to increase consumption of the thing advertised. The record defeats the Secretary's arguments and demonstrates the falsity of that assumption.[11] As a prime example, the Secretary's reliance on the nonpeer reviewed 1987 Carmelita Enterprise Report

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[11] The assumption in *Central Hudson*, 447 U.S. at 569 that there is an immediate connection between advertising and demand is debunked by the record evidence in this case. Additionally, in *44 Liquormart*, 116 S.Ct. at 1511 this Court rejected *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341-342 (1986) and the government's argument that because commercial speech concerns products and services, greater deference must be afforded a legislative determination to regulate commercial speech to achieve the government's ends. *See also, Kiwi Fruit Commission v. Moss*, 45 Cal.App.4th 769, modified 46 Cal.App.4th at 1089c, 53 Cal.Rptr.2d. 138, 147, n.18 (1996) (observation that Posadas not only limited to facts, but presuming advertising increases demand empirically unsound). In *Turner*, 114 S.Ct. at 2471, the Court explained that Congress' judgments are not insulated from judicial review and First Amendment requires ensuring that Congress has drawn reasonable inferences based on substantial evidence. Neither the record nor the legislative history support the Secretary's position that compelled advertising increases consumption and/or grower profits.

for his argument that compelled advertising works (Pet. Brf. 36) does not change the fact that, as the Ninth Circuit correctly found, respondents poked several methodological holes in the report. The October 1987 report focused on 254 members of a Kansas City panel. JA 410. The report contains no discussion about any bias in the sample, i.e., relevant differences between members of the sample and members of the general consumer population; the report contains no discussion of the homogeneity of the population to determine whether the sample size is adequate; nor do the panel members' responses support the Secretary's assertion. The people interviewed were exposed to excerpts of compelled advertising television and radio ads and then asked to prove they were "aware" of the ads by describing something about the ads not in the excerpts. JA 411. Measuring levels of awareness of the ads resulted in assignment of a percentage of the sample who acknowledged awareness of at least one commercial. JA 416. The report calls this percentage the "net campaign awareness." *Id.* The report then admits that it assumes awareness of the advertising equates to a finding that the advertising is persuasive. *Id.*

The Secretary's reliance on a perceived correlation between awareness of the ads and the purchase of fruit is without foundation. The Carmelita report completely fails to allow for the impact, if any, of individual advertising to which the interviewees may have been exposed. Retailer television or radio advertising, handler and retailer point of sale, newspaper or other private advertising, may account for all consumer purchases — with no relationship to the compelled advertising supplied by respondents' assessment monies. In fact, the Carmelita report even suggests in-store, point of purchase advertising may be better than "generic" television advertising.[12]

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[12] In-store point of purchase advertising is the type of advertising that respondent Kash, Inc., for example, would use to a greater extent if not

Most telling, to measure the impact of forced "generic" advertising, the Carmelita report compared the interviewee's fruit purchases in 1986 to purchases made in 1987 and concluded that those interviewed purchased fewer peaches and plums than the previous year — and about the same amount of nectarines. JA 419. This additional finding discredits the Secretary's contention that compelled advertising increases consumption.[13] Despite the failure of "generic" advertising, at least in Kansas City, the committees went on in 1988 to spend 43 percent of the advertising budget, or approximately $2,385,000, on television ads, and an additional 20 percent, or approximately $1,115,000, on radio ads. Similarly, in 1989 the committees spent 28 percent of the advertising budget, or $1,441,000, on network and cable TV ads, and 23 percent, or $159,000, on radio ads. JA 533, 535.[14]

Besides the failure of the Carmelita report to show that so called "generic" advertising advances the asserted governmental aims, substantial evidence clearly established that compelled advertising forced respondents to pay for advertising their competitors' particular varieties — not total market. CTFA's manager testified under oath (at the hearing on

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forced to expend his advertising budget to support the committees' compelled advertising program. App. 19a, n.9; See, JA 545-546.

[13]See "Loved The Ad. (May or May Not) Buy the Product," Wall Street Journal, April 7, 1994, page B1 (7 packaged goods among the most popular and best remembered commercials of 1993 — 5 of those brands had either flat or declining sales).

[14]A small portion of the expenditure represented on Trial Exhibits 351 and 348 (JA 533, 535) includes pear promotion. JA 742-743. No TV ads were run for pears. JA 742. Pear ads on radio began about the 12th week of a 18-week peach, plum, and nectarine advertising campaign; by that time the peach, plum, and nectarine ad expenditure has expended 87 percent of the budget. JA 742, 534, 536. The percentages and allocations of expenditure on Exhibits 348 and 351 relating to peaches, plums, and nectarines are insignificantly affected by the pear radio advertising expenses. JA 743.

the 7 U.S.C. 608c(15)(A) petition brought by respondent Gerawan Farming, Inc.) that the millions of dollars extracted from California handlers in advertising assessments were expended solely on "generic" advertising — no specific variety was promoted. Opp. 349a. However, one week later, CTFA's 1989 California Summer Fruit Late-Mid Season Varieties Brochure was distributed throughout the nation, which included the specific promotion of the "Red Jim" nectarine — the exclusive proprietary variety of committee member Jim Ito. App. 15a, n.6; Opp. 349a; JA 531. Compelled advertising also forced respondents to pay for advertising the proprietary variety of a nectarine known as the "Maybelle" exclusively owned and distributed by a particular family packing operation. JA 618. The Maybelle similarly appears on CTFA's 1989 California Summer Fruit Early-Mid Season Varieties Brochure. JA 532.

Proprietary varieties of others cannot lawfully be planted or sold by respondents. Respondent Ray Gerawan testified that the Red Jim nectarine directly competes with his varieties. To compete with the Red Jim nectarine (one of the more popular varieties sold), it is necessary for Gerawan to spend additional money and expend additional effort to promote his own "Prima Red" variety. Yet, while he expends his own money to compete with the Red Jim, the commodity committee is spending Gerawan's assessments to directly promote his competitor's variety. See, Opp. 349a[15] Testimony established that in addition to promoting

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[15]Other record evidence further underscores the variety-specific and insider manipulation of compelled advertising. In April 1988, committee member Jim Ito wrote to CTFA'sdirector of merchandising threatening him over the content of trade communications promoting varieties other than the Red Jim nectarine. JA 434-434. The CTFA manager wrote back that the trade communication sought to promote Fairlane, Flamekist, Autumn Grand, and Late Le Grand varieties of nectarines, but did not mean to do so to the detriment of Ito's brand. JA 438. The manager also explained that CTFA often selected Ito's fruits for use in

proprietary varieties, the committees' color brochure advertising promotes only the top selling 15 varieties of peaches, plums, and nectarines. See, Opp. 333a. Only varieties sold in "significant volume" make it to these charts. W/K-II, R.T. 2293, 2374; See, JA 531, 532. In 1988 the committees spent 19 percent, and in 1989 23 percent, of the advertising budget, over one million dollars each year, on this form of advertising. See, JA 533, 535.

The compelled advertising program seeks to increase sales of those varieties that already command a significant portion of the market. Handlers of varieties other than the current top 15 sellers are literally forced to finance the promotion of their competitors' fruit.[16] Nor are these isolated instances; CTFA's manager testified that the compelled advertising of specific varieties will become an even greater problem over time [as new proprietary varieties move into the category of the select 15]. W/K-II, R.T. 4888. Most damaging, CTFA's manager testified that as much as 40 to 60 percent of the varieties promoted are varieties sold in the market place under only one handler's label. W/K-II, R.T. 4889-4890. Yet, respondents' assessments are extracted to advertise these select proprietary varieties none of which respondents grow or sell.

Compelled advertising also projects a particularized message that red nectarines (of respondents' competitors, including the committee members, to the potential detriment of the yellow varieties grown by respondents) are better than

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the committees' advertising efforts. JA 439. On another occasion Ito refused to pay his assessments unless committee television advertising ran at the same time his Red Jim nectarines were harvested. JA 633. The ad agency was ordered to accommodate the timing of Ito's Red Jim harvest. JA 634.

[16] At the time of hearing, for example, approximately 130 varieties of peaches were under the jurisdiction of the peach committee. W/K-II, R.T. 1436.

other varieties. App. 15a, n.6. This is subtle, broad based advertising of varieties grown by respondents' competitors. Compelled advertising also does not consider or benefit members of the industry who sell to buyers different from those that the compelled advertising targets. Wileman Bros. & Elliott, Inc., does not sell directly to retailers, but instead sells primarily to brokers and jobbers. W/K-II, R.T. 3882-3884. Nonetheless, Wileman Bros. & Elliott, Inc. must pay for advertising directed to consumers who buy its competitors' fruit.

The committees additionally force respondents to pay (through their assessments) for other activities that serve only to benefit committee members. For example, in June 1989, buyers from "Lucky" stores were provided meals, cocktails, hotel accommodations and tours of the packinghouse owned by the chairman of the nectarine committee; a tour of Ito packing, owned by a commodity committee member and owner of the proprietary variety — Red Jim nectarine; a tour of Ballantine produce, owned by the long time chairman of the plum committee; and a tour of Wawona packing where the chairman of the peach committee is employed. See, JA 495, 626-629; Opp. 309a-310a. Forcing respondents to pay for tours to bring retail buyers to companies owned by or connected to commodity committee members cannot fairly be said to be aimed at increase in market other than for the commodity committee members.[17]

USDA argues that forced advertising has "utility," which individual advertising lacks. This argument fails to improve upon USDA's weak posited concern regarding underadver-

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[17] A CTFA employee questioned why the "Lucky" tour only involved a few select packing houses, when many others sell to Lucky stores as well. JA 634. CTFA personnel explained that Wileman/Kash would not be included in the tour because CTFA could not control what respondent Elliott, for example, would say during such a tour. JA 635.

tising. Citing the September 1989 nonpeer reviewed RMC report, dated only one month before the start of the administrative hearing in this case, the Secretary argues individual advertisers will not present fruits in a group, but that the committees' compelled advertising does, which allegedly creates a synergistic effect with purchase begetting purchase.[18] Pet. Brf. 39. The RMC report begins by pointing out its conclusions are not statistically supportable, but instead merely represent "qualitative" observations of those who responded. JA 519. Even with this qualifier, the report underscores the failure of the forced advertising. The report concludes that the grouping of peaches, plums and nectarines (also Bartlett pears) is an artificial grouping imposed by the committees. JA 519. Compelled advertising failed to provide a sufficient "... artifice to hang them together ... [and does] not ... identify the fruits in the consumer's mind." JA 523.

Citing the RMC report, the Secretary next argues that only compelled advertising effectively uses "point of sale" efforts to educate consumers about "how tree fruits should be ripened," allegedly because consumers are ignorant and individual handlers lack incentive and resources for this type of advertising. Pet. Brf. 40. *First.* The RMC report takes care to point out that its conclusions are of no statistical use to project conclusions beyond those persons interviewed. JA 519. Hence, even if the ignorance which the Secretary espouses does exist, it cannot reliably be said to go beyond those interviewed. *Second.* The record evidence concerning education about how to ripen fruit is sketchy at best. For a time the committees *sold* ripening bowls (in which fruit is

[18]The record evidence establishes the inverse of the Secretary's contention that individual advertisers would not group fruits together. Wileman Bros. & Elliott, Inc., for example, presents, displays, and discusses grapes, oranges, nectarines, and plums together in one detailed, colorful brochure. JA 537-544.

placed to ripen), but the profits generated from sales of these bowls were later siphoned to an entity called Tree Fruit Reserve — an entity purposely used by committee chairmen to engage in activities that are illegal for them to do in their capacities as committee chairmen. Opp. 165a, 173a-174a. While the committees did use assessments to pay for paper bags stamped with the phrase "Ripening Bag," no record evidence supports the Secretary's assertion that consumers were educated about ripening fruit by these efforts or that individual advertising cannot provide that same education. W/K-II, R.T. 4679. *Third.* The Secretary mixes items from the educational assessments expenditure with those earmarked for compelled advertising. Expenditures for the ripening bag, for example, are from the assessments allocated to publicity and education. W/K-II, R.T. 4679. This category of expenditure accounted for only 5.5 percent of the budget for 1989 or $280,000 out of an advertising budget of well over 5 million dollars. JA 535. *Fourth.* The Secretary's contention that consumer ignorance can only be effectively addressed by compelled advertising buttresses respondents' contentions that compelled advertising is impermissibly based on the Secretary's unsupported paternalistic assumption that the committees know best what to say about the fruit and how to say it. *See, Riley*, 108 S.Ct. at 2675 ("the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners").

The Secretary's concern that compelled advertising is needed to focus on repeat purchasers who begin buying early in the season, because individual handlers' advertising allegedly takes place only when their varieties ripen, is similarly unpersuasive. Pet. Brf. 40-41. The Secretary, citing the nonpeer reviewed 1987 NPD/Nielsen report, relies on a supposition that buyers who make purchases in the first four weeks of fruit availability were more likely to return to make a second purchase than buyers who do not make a purchase

until the second four weeks of availability. Assuming the Secretary's supposition holds true, compelled advertising should instead focus on those who make their initial purchases later in the fruit availability window, instead of preaching to the converted.

Compelled advertising concentrates on early season varieties by running most of the advertising at the beginning of the season. The committees' compelled advertising efforts take place over an 18-week period. W/K-II, R.T. 4054. However, by the end of the fourth week, the committees have spent approximately 54 percent of the advertising budget. *Id.* 4082. This necessarily focuses on specific varieties available early in the season, well before the better quality, later season varieties are ready for market. Even if the early season advertising worked it would bring consumers into stores well before later season California fruit is available, guiding consumers to fruit from other nations with altered growing seasons (e.g., Chile). JA 660-661.

Forced advertising of select, discrete varieties and targeting market outlets of respondents' competitors' fruit does not advance total market, or result in benefit inuring to all required to fund the program. Compelled advertising of select varieties reduces and skews the free flow of vital commercial information to the public about the fruits, and impermissibly pressures respondents to expend additional monies to respond to the messages respondents are forced to finance — messages which they are not allowed to author and messages from which they do not benefit.

To side-step the record evidence, the Secretary argues the Ninth Circuit erred in requiring USDA to prove that compelled advertising increases sales better than individual advertising. The Secretary misapprehends the Ninth Circuit's decision. What USDA must demonstrate is that the harms it recites are real and that its regulation will in fact alleviate those harms to a material degree. *Edenfield*, 507 U.S.

at 771; *Turner*, 114 S.Ct. 2445. This USDA cannot do. There is no record evidence supporting the premise that underadvertising would occur, resulting in market instability, absent compelled advertising. There is no record evidence that handlers and growers would not advertise peaches, plums, and nectarines absent compelled advertising. There is no record evidence that without compelled advertising, growers and handlers would not combine their resources to promote their product. There is no record evidence that individual advertising is insufficient to increase overall market or enhance grower returns. The Secretary failed to show, much less prove, the harm he recites is real, and that forced advertising alleviates that harm to any degree.

3. Compelled Advertising Does Not Directly Advance The Government's Asserted Interest In Avoiding Free Riders

Finally, the Secretary argues that compelled advertising directly advances a substantial governmental interest in avoiding free riders. Pet. Brf. 35, 43. Avoidance of free riders begins with the premise that those who would be free riders receive a benefit. However, USDA has not established any enhancement of grower returns or any increase in total demand. Even so, compelled advertising does not avoid free riders because unlike in the union and integrated-bar context, the constituency of the commodity committees extends beyond those who pay assessments. Pet. Brf. at 25, n.16. The Ninth Circuit also correctly pointed out that "[i]f the Secretary is worried about free-riders, there are already plenty of them in other states[ ]"— thirty-three states handle peaches commercially, twenty-eight handle nectarines and twentysix handle plums, yet only central California handlers are required to advertise. See, App. 21a.

C. Compelled Advertising Is More Extensive Than Necessary To Serve The Asserted Goals

Under *Central Hudson*, regulation impacting commercial speech must be no more extensive than necessary to serve the asserted interest. 447 U.S. at 566. The Secretary cannot show a sufficient fit between his stated goals and the abridgment of respondents' First Amendment rights. *See, 44 Liquormart*, 116 S.Ct. at 1510 (plurality) (even under less strict standard in commercial speech cases, state failed to show "reasonable fit" between temperance goal and abridgment of speech). The incontrovertible record evidence proves that compelled advertising completely fails to be no more extensive than necessary to serve the asserted goals. Compelled advertising promotes proprietary varieties, select high sales volume varieties, pushes red varieties, spends most of the advertising budget on early varieties, 40 to 60 percent of the varieties advertised are discrete varieties shipped only under individual labels, and the committees use assessments to pay for activities that can only fairly be said to benefit the committee members. Apart from this evidence and the evidence contradicting the Secretary's claim of enhanced grower returns, use of compelled advertising to achieve the asserted aims reflects a poor ends/means fit for other reasons as well.

The Secretary cannot show that compelled advertising increases total demand when the stone fruit promotion subcommittee's own advertising personnel explained to the committee that because all supplies of stone fruit that make it to market are consumed, the impact of compelled advertising cannot be measured. See, USDA Trial Exh. 297, Jan. 27, 1987 Promotion Subcommittee Minutes, p. 6. On the other hand, the Carmelita report the Secretary relies on concluded that persons *in the sample* purchased fewer peaches and plums in 1987 than the prior year, despite compelled advertising, primarily because of the appearance

or condition of the fruit. JA 426. The experiences of the committees' advertising personnel not only belie the Secretary's contentions about decreased demand, but also confirms the failure of the Carmelita report to contain a representative sample; nevertheless, the Carmelita report makes respondents' point — it is brand recognition and individual quality that affects purchases, not "generic" ads. If the Secretary has a substantial interest in benefiting California growers of stone fruit (to the exclusion of growers of other commodities and stone fruit growers in other states) he should concentrate on quality control, instead of hindering branded advertising while purportedly pushing a "generic" message.[19]

The Secretary argues that individual advertising is insufficient because it is intended to "increase the demand for the advertiser's own brand, which can result either from encouraging existing consumers of the commodity to choose the advertiser's particular brand, or from increasing overall consumption for the commodity." Pet. Brf. 38, 46. The Secretary asserts this "dual focus" detracts from the effectiveness of brand advertising to increase demand across the industry.[20] Compelled advertising, however, is simply a shift, from that which the Secretary complains individual advertising does — promote only individual handler's product — to even narrower select, discrete variety advertising of the committees. The spillover effect the Secretary relies on also undercuts his assertion that free-riding in other states is

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[19]The record additionally shows that assessments and the percentage used for compelled advertising vary yearly with the size of the crop. See, e.g., JA 319, 359. This elasticity undercuts the Secretary's use of compelled advertising to increase total market and expand regional, national, and overseas markets.

[20]Respondents are not concerned with increasing demand "across the industry." They are interested in promoting their own product and increasing demand for their own specific brand label.

"limited" because compelled advertising aims to promote California fruit as unique (Pet. Brf. 31), since assuming, *arguendo*, compelled advertising works, it follows that promotion of California fruit similarly increases consumption of fruit from handlers and growers in other states, thereby creating free riders.[21]

Using compelled advertising to increase total market still lacks coherence when so many other states commercially handle the same commodities without being forced to advertise. CTFA's Dave Parker testified that the goal of compelled advertising is to get retailers to push California peaches, plums, and nectarines more than peaches, plums, and nectarines from other states. JA 610. The Secretary seeks to increase the size of California's slice of market in relation to the slices the other producing states enjoy. Following the Secretary's logic, he will reduce the slices of market share that South Carolina and Georgia enjoy because he does not force handlers in those states to advertise. See, JA 391 (In 1987 South Carolina produced 350 million pounds of freestone peaches; Georgia produced 100 million pounds).

The Secretary would undo with one hand what he tries to do with the other. Reduction of returns to growers and market instability is more likely under the Secretary's reasoning. To increase California's share of market, greater production of the commodities must occur. But, in theory, this would lead to over production, reduced returns to California growers, reduced returns to growers in other states and a decline in their production thereby creating market instabilities. Plus, the Secretary's hidden premise that compelled advertising will result in an increase in

[21] Because most supermarkets do not identify the state or country of origin, once the fruit is on the supermarket shelves, it is impossible to distinguish a California peach from a Georgia peach, a South Carolina peach or a Chilean peach.

production is at odds with Congress' express declaration that the AMAA provisions for orderly marketing conditions were not "intended for the control of production[.]" 50 Stat. Ch. 295, June 3, 1937.

The Secretary contends that compelled advertising is narrowly tailored because Congress cannot require the public to increase consumption of peaches, plums, and nectarines. Pet. Brf. 45. The assertion of this as a carefully considered alternative is no answer and it turns the analysis in ***44 Liquormart***, 116 S.Ct. 1495 on its head. There, the Court explained that under the First Amendment, attempts to regulate speech are more dangerous than attempts to regulate conduct. *Id.* 1512. The assertion that because Congress cannot force the public to eat fruit, the Secretary can freely force handlers to advertise is contrary to this basic principle.

The Secretary argues that compelled advertising would not be more narrowly tailored by allowing credits against assessments for handlers that engage in their own advertising because credits would be contrary to his interest in avoiding free riders. Pet. Brf. 46. The Secretary's argument ignores that credits do not allow handlers to avoid advertising. To avoid funding the committees' advertising program, the handlers' only alternative would be to engage in their own individualized or cooperative advertising. Assuming the Secretary could permissibly mandate either form of advertising in this way, his arguments regarding underadvertising dissipate.[22] The Secretary's only basis for refusing credits is that he impermissibly favors the content of committee

[22] When authorizing credits for handlers of filberts (hazelnuts) engaged in their own advertising, the legislative history points out that the credits "would stimulate filbert handlers to promote their own brands and to develop their own promotional programs in concert with the overall marketing strategy." Pub. L. 98-171, 97 Stats. 117 (1983).

advertising and disfavors the content of individual advertising.

In sum, this record shows compelled advertising completely fails scrutiny under *Central Hudson* since no substantial interests are directly advanced in a manner no more extensive than necessary.

II. Compelled Advertising Violates Core First Amendment Protection From Forced Speech And Association

Beyond compelled advertising's failure to survive intermediate scrutiny under the commercial speech doctrine, respondents contend compelled advertising is presumptively invalid under the compelled speech rubric. Respondents must pay for content-based compelled advertising messages they are necessarily associated with — and disagree with on commercial, economic, moral and ideological grounds. Compelled advertising also fails strict scrutiny applied to interference with associational rights.

A. Compelled Advertising Is Presumptively Invalid Because Respondents Must Fund Content-Based Messages That They Disagree With And That Impel Response

Compelled advertising is presumptively invalid because it not only disseminates messages closely associated with respondents, but it burdens respondents' speech and favors the speech of the committees based on content, while impelling respondents to alter their speech in response — or remain silent. The Secretary cannot point to any governmental need sufficiently weighty to sustain the presumptively invalid forced advertising program.

The First Amendment protects the right to speak freely and refrain from speaking. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633-634 (1943); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974);

Wooley v. Maynard, 430 U.S. 705, 715 (1977); *Pacific Gas & Electric v. Public Ut'l Comm'n. of Cal.*, 475 U.S. 1, 11 (1986). This principle applies equally to expressions of "value, opinion, or endorsement, [and] statements of fact the speaker would rather avoid [Citations omitted]." *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338, (1995). The controlling principles in these cases include impermissible penalization of points of view, or a content basis for the regulation, or forcing a speaker to alter its speech to conform to an agenda it does not set. Forced association which burdens protected speech in these ways is impermissible. *See, Pacific Gas & Electric*, 475 U.S. at 9-12.

Compelled advertising uses respondents and their handling of the regulated fruit as an advertising mechanism for the committees and respondents' other competitors. The compelled advertising messages are often identified as coming from the growers, which includes respondents. See, JA 396-400, 428-432. The messages are sometimes identified as coming from the California Tree Fruit Agreement (CTFA), or the peach, plum, and nectarine committees and their employees, whom the Secretary argues essentially "represent" respondents as handlers and growers.[23] See, JA 530;

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[23]These identifications undercut the Secretary's assertion that the connection between respondents and the forced advertising program is "attenuated," and thus somehow similar to "government speech." Pet. Br. 25, n. 16. Not only is the government speech doctrine not properly before the Court, but the Secretary's attempt to analogize the committees and their relationship to growers and handlers to unions and integrated bars underscores that the assessments and advertising messages attach to a small group and as such the compelled advertising cannot be said to be government speech, conducted by USDA, as representative of the people. *See, Frame*, 885 F.2d at 1133. The record also belies the Secretary's assertion that there is a "substantial degree of government involvement in the development and adoption of the promotional efforts[.]" Pet. Brf. 25, n. 16. The ALJ found that: ". . . based on

Pet. Brf. 36, n.22. When respondents must pay for, and be associated with, the advertising messages, they are, in essence, forced to proclaim to the public and to other businesses that they desire to engage in the propounded advertisement, that they believe in the message propounded, that they believe the type of message conveyed is the message they want to project and reaches the audience that they wish to reach, and that this message is being conveyed of their own free will. When one sees or hears an advertisement for the sale of stone fruit, the listener or viewer assumes that those paying to disseminate the message are attempting to sell the product in the manner that the product is being promoted, believe that the advertising is necessary to the sale of the product, and are free to send the message conveyed. The listener is not aware that the persons paying for the advertisement are forced to advertise and forced to advertise in that method and manner.

This association or nexus between respondents and compelled advertising messages invidiously forces response, endorsement, or silence.[24] Compelled advertising forces respondents to pay for, among other things, promotion of

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the stipulated responses, and other evidence, there is a lack of showing of independent scrutiny and analysis of the Committee's recommendations, and there is no way of knowing upon what factual basis the Secretary did, in fact, base his approvals. One can try *in vain* to give the Secretary benefit of doubt, namely, that he was aware of important matters affecting the industry and that his approval was a significant act." Opp. 337a (italics added).

[24]The closeness of the association that creates these dangers can be a matter of degree. *Cf., Turner*, 114 S.Ct. at 2459 (cable's history as conduit for broadcast signals leaves little risk viewers would assume stations carried on cable convey ideas or messages endorsed by cable operator or create danger of altering agenda) *with Hurley*, 115 S.Ct. 2348 ("when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."); *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality) (assessment of

proprietary varieties, advertising the top selling 15 varieties (when there are hundreds of varieties), advertising early season varieties (which respondents don't grow), and other select varieties shipped under individual handler's labels, while pushing the particularized messages that red nectarines are better than other varieties. The committees promote particular messages to manipulate consumption of particular varieties of stone fruit. Compelled advertising has the effect of impelling respondents to fight against messages which they must finance and with which they must associate. Respondent Gerawan testified that he feels impelled to increase his efforts to promote his brand label because the compelled advertising promotes his competitors' fruit. Opp. 349a-350a. This testimony was adopted and affirmed by all respondents who testified. *Id.*

Besides variety-specific promotion, the committees also promote two falsehoods respondents cannot condone —"red is better" and "all California fruit is the same." Substantial testimony established that different varieties of the same commodity have different tastes. Even the same variety grown on different parcels of land will have differences in taste, color, size, amounts of soluble solids, etc. W/K-II, R.T. 2961-2963, 4596-4597; JA 589. The stone fruit industry is very competitive, despite the restrictions imposed by the marketing orders. Respondents have developed cultural practices that enable them to grow and harvest high quality fruit they consider substantially superior to that grown and packed by most of their competitors. Respondents contend "truth" in advertising is literally a matter of taste and their commodities are superior to varieties that the commodity committees advertise and any message that all California

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employees' salary under patronage system for advancement of political party's policies tantamount to coerced belief).

fruit is the same is false and belied by the record evidence of variety-specific compelled advertising.[25]

The Secretary even argues that respondents should alter their own speech to attempt to distinguish their varieties while criticizing the compelled advertising messages. Pet. Brf. 22. On the other hand, respondents might conclude under these onerous circumstances not to engage in their own advertising thereby reducing the free flow of valuable information the First Amendment protects. In addition, the connection of the compelled advertising messages to respondents cannot be reduced by labels to defeat a First Amendment claim since even the presence of a disclaimer to avoid giving listeners and viewers the impression that the forced advertising messages are respondents' messages would not eliminate the impermissible pressure to respond to the committees' messages. *See, e.g., Pacific Gas & Elec.*, 475 U.S. at 16, n.11 (presence of required disclaimer on consumer group's messages did not eliminate impermissible pressure on utility to respond). The First Amendment should not be read to allow the coercive power of the government to compel financing of discrete messages, even advertising messages, from a particular group and purportedly on behalf of a particular group by cloaking the connection between the messages and those compelled to pay for them.

More importantly, compelled advertising is content-based regulation. The most exacting scrutiny applies "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner*, 114 S.Ct. at 2459. "[L]aws that by their terms distinguish

[25] See, Alex Kozinsky and Stuart Banner, *Who's Afraid of Commercial Speech?* 76 Va. L. Rev. 627, 635 (1990) ["What about the claim that Burger King's hamburgers taste better than McDonald's because they are charbroiled? That begins to sound more like the claim of a political candidate; it's hard to say that its truth can be easily verified."]

favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.* "[E]ven a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys." *Id.* "Content-based regulations are presumptively invalid [Citation]." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Despite the Secretary's assertion that compelled advertising is not imposed based on, or triggered by, respondents' advertising (Pet. Brf. 20, n.14), the goals, justifications, and the imposition of the compelled advertising reflect its content basis. The Secretary's contention that compelled advertising increases demand (which according to the Secretary individual advertising cannot do sufficiently because it aims to give the particular advertiser a greater share of that market) and his contention that compelled advertising has utility that individual advertising does not, manifestly relates to favoring the content of committee messages. The aim to promote particular content is best illustrated by the Secretary's refusal to allow credits against assessments for handlers' own advertising because individual advertising, in the Secretary's view, is aimed at inuring benefit to the individual, not the collective. Pet. Brf. 46.

The Secretary apparently would credit individual advertising if its content served the collective. The Secretary admits as much when he argues, in context of almonds, "certain types of individual and brand advertising" and "authorized private advertising" may be acceptable for credits. Pet. Brf. 47. The speaker-based allowance of credits can only be explained in reference to content.[26] This offends the core of the First Amendment. Indeed, this goes beyond

[26] *Cf., Turner*, 114 S.Ct. at 2460 (cable TV "must carry" provisions distinguish between speakers based on manner in which speakers transmit messages; so long as not subtle means of exercising content preference, speaker distinctions of this nature not presumed invalid).

mere content-based regulation to regulation based on viewpoint. *See, e.g., R.A.V.*, 505 U.S. at 391 (viewpoint discrimination of St. Paul bias motivated crime ordinance illustrated by pointing out that aspersions cast upon a person's mother could be used by one arguing in favor of racial, religious, and gender tolerance, but such aspersions could not be used by that speaker's opponent). The Secretary refuses to diminish the burden on respondents' First Amendment freedoms because individual advertising reflects the individual's mind set and incentive to advertise his fruit in particular; unless the handler is a dominant player in the market, such as Blue Diamond in the almond market. Pet. Brf. 47. The Secretary will allow credits for advertising "buy fruit from the dominant handler," but in a market not dominated by a single handler, individuals can not obtain credits for advertising "buy my fruit, it's better than fruit from a market-dominating handler." In this way, the Secretary favors a particular viewpoint.

The Secretary avers that allowing credits for advertising in a market dominated by one handler will not result in a significant free rider problem. Pet. Brf. 47. This is just another way of saying the Secretary prefers the content and viewpoint of dominant handler advertising. Credits do not allow free riding, assuming, *arguendo*, any benefit could be derived, since the only way a handler may avoid funding compelled advertising is to engage in its own advertising. By assuming that compelling handlers to advertise their own product to circumvent funding the generic program still would not achieve what a dominant handler's advertising would achieve, the Secretary impermissibly favors brand name advertising content and viewpoint from a market-dominating handler.

Contrary to the Secretary's assertion, moreover, compelled advertising need not be "triggered" by speech of any particular content to be impermissible. *See, e.g., Turner*, 114

S.Ct. at 2465 (explaining that in *Pacific Gas & Elec.*, 475 U.S. 1, compelled speech not triggered by particular content, but regulation impermissibly conferred benefit to speakers based on viewpoint different from utility). "[T]he law [] is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 115 S.Ct. at 2350.

In this regard, compelled advertising serves the impermissible purpose of enhancing the relative voice of respondents' competitors based on preference for the committees' messages. Respondents have the right "to be free from government restrictions that abridge [their own] rights in order to 'enhance the relative voice' of [their] opponents." *Pacific Gas & Electric*, 475 U.S. 1, 14 [quoting, *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)]. The Secretary identifies a favored speaker — the commodity committees — based on the interests they represent and forces respondents to make dissemination of the committees' variety-specific advertising messages possible by extracting heavy assessment amounts. This necessarily burdens the expression of the disfavored individual advertisers. *See, e.g., Pacific Gas & Electric*, 475 U.S. at 14 (rule that identified speakers based on interests different from PG&E, and then forced PG&E to assist in disseminating that speaker's message, impermissibly burdened PG&E's expression). This is particularly true where, as here, in contrast to integrated-bar and union dues, the more fruit one handles, the more one is forced to pay for the advertising messages of competitors.

Compelled advertising is invidious to the First Amendment where it is premised on impermissible paternalism. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how they want to say it [Citations omitted]." *Riley v. National Federation of the Blind et al.*, 487

U.S. 781, 790 (1988). "To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners[.]" *Id.* The Secretary's arguments clearly demonstrate the impermissible paternalism engendered by the compelled advertising program; he contends the committees know best how to promote California peaches, plums, and nectarines.

Compelled advertising is presumptively invalid, for it is content-based, premised on paternalism, and forces respondents to be associated with messages they disagree with and that impel response. As shown above in part I, the Secretary has no asserted governmental interests sufficient to overcome the presumption of invalidity.

B. Compelled Advertising Also Interferes With Respondents' Right To Freedom Of Expressive Association

Strict scrutiny must be applied where compelled advertising implicates respondents' freedom from forced expressive association. The Constitution protects the freedom of individuals to associate for protected speech activities. *Roberts v. United States Jaycees*, 468 U.S. 608, 618 (1984); *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). The right of freedom of expressive association presupposes a right not to associate. *Roberts*, 468 U.S. at 623 (citing, *Abood*, 431 U.S. 209, 234-235). Government interference with associational rights must be justified by "compelling interests, unrelated to the suppression of ideas, which cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623.

In *Frame*, 885 F.2d 1119 the court applied the scrutiny articulated in *Roberts*, 468 U.S. 608 to Frame's First Amendment claims against the Beef Promotion and Research Act of 1985, 7 U.S.C. section 2901, *et seq.* Similar to the challenger in *Frame*, respondents are forced to finance

particular advertising messages related to their industry. By definition, forced participation impacts respondents' associational rights.[27] Additionally, even though not required for First Amendment protection, no workable line of predominately commercial expressive association can be drawn.[28]

Beyond advertising select, discrete varieties of fruit of respondents' competitors, the compelled advertising employs morally objectionable sexual overtones. For example, Mr. Rodney Chang, President of Kash, Inc., identified a CTFA television advertisement which he found objectionable because of its subliminal sexual overtones. See, JA 530; App. 15, n.6. The First Amendment protects against forced fostering of morally objectionable points of view. *Wooley*, 430 U.S. 705, 715 ("The First Amendment protects the rights of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.") The transcript of a radio ad bears out the sexual overtones of the committees' advertising by asking the listener to associate biting into a big juicy peach with the first time the listener danced with a girl; to associate savoring the juice of a fresh ripe plum with the boy the listener met one summer and never saw again; to associate the taste of a sweet, fresh nectarine with the first time the listener kissed a boy and liked it; and biting into the sweet softness of a pear with double dating — all brought to the listener by "California growers." JA 429-432. A cogent argument can be made that ideologies are based on value systems. Use of sexual connotations in advertising can offend, in addition to moral offense, at an ideological level

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[27] The marketing orders further require respondents to maintain books and records, and to make regular reports to CTFA. See, 7 C.F.R. 916.60, 917.50.

[28] *See, Roberts*, 468 U.S. at 634 (O'Conner J., concurring).

no less than being forced to associate with expressive activity about other ideological values.[29]

This forced expressive association is directly tied to the messages, rather than opening up membership as was the issue in *Roberts*, 468 U.S. 608. There, the danger was impairment of the ability of the original members to express the views that brought them together. *Roberts*, 468 U.S. at p. 623. Here, the original message is not respondents' at all. Respondents are forced at the outset into expressive association not their own. Moreover, unlike the state interest in stopping discrimination against women at issue in *Roberts*, respondents are forced into expressive association premised on the Secretary's impermissible content-based paternalistic assumption that the committees, not individuals, are better suited to promote stone fruit. There is also a significant danger of impelling counter expressive association. At the same time, the danger of silencing a different collective voice is significant when handlers are faced with the prospect of paying to support the association while also compelled to pay assessments to the commodity committees to support forced advertising. *See, Elrod*, 427 U.S. at 356.

Comparing the record here with the record in *Frame*, 885 F.2d 1119 underscores the failure of compelled advertising to survive scrutiny. The Third Circuit found the beef promotion program withstood First Amendment scrutiny based upon an overwhelming congressional record. In *Frame*, Congress expressly found the beef industry to be on the verge of crumbling — which Congress believed would be

[29] Attempts to influence consumer preferences has potential political aspects as well. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 538-539 (1991) (Brennan, J., concurring) ("May the city decide that a United Automobile Workers billboard with the message 'Be a patriot — do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it?"). Here, one admitted object of the compelled advertising is to push California fruit rather than fruit from other states. JA 610.

devastating. *Frame*, 885 F.2d at 1134. The beef industry and Congress decided to embark upon an advertising program. Because Congress envisioned the collapse of our nation's economic base without the implementation of a beef promotion program, the court found a compelling governmental interest sufficient to overcome free speech and associational freedoms within the cattle industry nationwide. *Id.* 1137.

In contrast, no such economic crisis in the tree fruit industry exists. California growers and handlers did not go broke because of not advertising.[30] No in-depth Congressional investigation supported amendments to 7 U.S.C. Section 608c(6)(I) providing the Secretary authority to implement forced advertising. No evidence was proffered that the national economy would collapse without commercials imploring consumers to "eat California fruit." The history behind the amendments giving the Secretary authority to force advertising of nectarines and plums makes clear that USDA had no experience in advertising, and the history accompanying the amendment giving the Secretary authority to force advertising of California peaches merely notes that the amendment could be the "facility" for financing advertising. *See, supra*, 4.

In addition, California cattlemen are not singled out, as California tree fruit handlers are, to finance and subsidize a promotion program for an entire nationwide industry. The discriminatory impact of the compelled advertising program as applied to central California stone fruit handlers cannot be equated with a sufficient "fit" between the asserted governmental interest and the regulations at issue. For example, the beef promotion program is nationwide. For

[30] The federal plum marketing order was discontinued prior to the 1991 harvest season. As a result, no forced "generic" advertising took place during the 1991 through 1993 harvest seasons. Instead, the growers formed a voluntary program. In 1994, a state marketing order was put into place regulating maturity and advertising.

every head of cattle sold in America, or imported into America, a $1.00 assessment, set by Congress, is applied to the beef promotion program. On the other hand, within the compelled advertising program for California peaches, plums, and nectarines, the assessment level is a moving target set by the committees and rubber stamped by the Secretary; more importantly it is paid for *only* by central California stone fruit handlers. Historically, the cost of advertising, and accordingly, the assessment rate continues to rise. The extensive hearing record shows that respondents are forced to pay to advertise proprietary and other select varieties of fruit, while respondents' own distinctive advertising efforts are hampered or foreclosed by the assessment burden forced on respondents to support compelled advertising. As this demonstrates, compelled advertising fails strict scrutiny.

III. Compelled Advertising Fails The Germaneness Test

The Secretary argues that the most analogous cases are those involving forced funding of union activities as in *Abood*, 431 U.S. 209, and compelled integrated bar dues as in *Keller v. State Bar of California*, 496 U.S. 1 (1990). The Secretary reasons that the analogy the Court found in *Keller*, 496 U.S. at 12, between the state bar and its members and unions and their members should be extended to encompass the relationship between California stone fruit handlers and the advertising program the handlers are forced to support. Pet. Brf. 24. The principle from *Abood* relied upon in *Frame* (and the Ninth Circuit in *Cal-Almond*), is that compelling one to make contributions of money for otherwise constitutionally protected purposes "works no less an infringement" than prohibiting such contributions. *See, Abood*, 431 U.S. at 234; *Cf. Riley*, 487

U.S. 751, 797 (explaining that, in context of fully protected expression, compelled speech is constitutional equivalent to compelled silence [citing cases including *Abood*, 431 U.S. at 234-235]). Beyond this principle, however, the Secretary's efforts to apply the test developed in the *Abood* line of cases to compelled advertising is unpersuasive. The *Abood* test is designed to balance interests not at stake here.

The perceived unequal bargaining power between employer and employee led to legislative enactments to realign that bargaining power. See, e.g., 79 Cong. Rec. 7565 (1935) (Senator Wagner's remarks re Wagner Act); NLRA of 1947, 29 U.S.C. 141 *et seq.* (Taft-Hartley Amendments). The national interest in labor-management peace resulted in statutory schemes allowing one collective bargaining representative to exclusively speak for represented employees. Allowing voices other than the certified bargaining representative to speak concerning wages, hours, and working conditions disrupts labor peace. *See, Abood*, 431 U.S. at 224 (confusion and conflict would result if rival teacher's unions each sought to obtain employer's agreement). The designation of exclusive representation carries great responsibilities and duties of fair representation of all employees in the unit. *Id.* at 221.

With the overriding principle of exclusive representation to achieve labor peace comes an ancillary interest in avoiding "free riding." Statutory schemes allow unions and employers to negotiate a union shop, where represented employees must join the union as a condition of employment, or an agency shop requiring payment of dues. Only the certified exclusive bargaining agent can negotiate a contract requiring all employees to make contributions to the union. *See, Ellis v. Railway Clerks*, 466 U.S. 435, 447-448 (1984). "[T]he free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its mem-

bers." *Id.* at 452 (union could not spend dissenters' dues for nonbargaining unit organization).

The driving forces that shaped the "germaneness" test are not at work here.[31] At the outset, the Secretary's posited concern about underadvertising is manifestly less important than aligning the bargaining power of employer and employee and labor peace. The AMAA does not seek to align respective bargaining powers between growers, handlers, and consumers of agricultural products. Congress expressly recognized this when amending the AMAA of 1933 into the AMAA of 1937. After pointing out that the AMAA had not been intended to control production, Congress expressly struck the language from the 1933 Act that claimed the policy of the Act was to establish and maintain "balance between the production and consumption of agricultural commodities . . ." and inserted instead "orderly marketing conditions for agricultural commodities . . ." 50 Stats. Ch. 296, p. 247, June 3, 1937. It follows that the AMAA, marketing orders in general, and compelled advertising in particular, do not seek an alignment of bargaining power similar to requiring employers to bargain with certified bargaining representatives. The Secretary admits as much when he acknowledges the implausibility of forcing the public to consume more fruit.

The Secretary's attempt to draw a substantial analogy between the stone fruit advertising program and the rela-

[31] In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 519 (1991) the Court explained that the Court's decisions emanating from *Abood* prescribe a case-by-case analysis of what activities a union may, consistently with the First Amendment, charge to dissenting employees: The activities must "(1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

tionship of unions and the employees they represent and integrated-bars and their members is similarly misconceived. The Secretary recognizes that unlike unions and integrated-bars, the constituency of the commodity committees extends beyond those who pay assessments. Pet. Brf. 25, n.16. The committees, as the Secretary argues, seek primarily to benefit the growers — not those who pay the assessments. Pet. Brf. 38. The Secretary's argument ignores that the committees represent inherently competing interests and ignores that committee members compete for sales with those whom the Secretary argues they represent.

The Secretary nonetheless argues in essence that the industry must speak with one voice through "generic" advertising. Quite apart from the record belying this supposition, the Secretary argues that respondents are free to advertise on their own. Assuming, *arguendo*, the Secretary is correct, his reasoning collapses from its own weight. In this context, it would equate to allowing employees to bargain on their own with their employer for wages, hours, and working conditions despite the existence of an exclusive bargaining representative, but still charging those employees union dues under the guise of avoiding free riders. Under these circumstances, the Secretary's analogy to unions and integrated bars unravels. Committees are not the exclusive voice of members they exclusively represent; nor do they carry the concomitant responsibilities and duty of fair representation.[32]

[32] Furthermore, for union expenditures procedural safeguards are required to guard against impermissible use of funds. See, e.g., *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986). Possibility of rebate is insufficient. *Id.* No such procedural safeguards exist here. Although not done for some time, USDA can criminally sanction handlers for not paying assessments. *Willow Farms Dairy, Inc. v. Benson*, 181 F.Supp. 802, 803-804 (1960) (twenty years since criminal prosecution for failure to make marketing order payments); *but see, Panno v. U.S.*, 203 F.2d 504, 509-510 (1953) (Defendants placed in

The Secretary's reasoning likewise ignores the fundamental principle that precipitates free riding. The Secretary's assertion that the regulatory schemes encompassing unions, integrated-bars, and the commodity committees all have in common no restriction on the contributors' speech (Pet. Brf. 24), ignores that here no exclusive voice speaks for handlers and growers, nor are the growers and handlers necessarily receiving benefits which in return requires mandatory dues to avoid free riders.[33] A union must represent all employees in the bargaining unit and must give the benefits it obtains by that exclusive representation to its members and nonmembers alike under the agency shop contracts. In *Keller*, 496 U.S. at 12, the Court acknowledged that members of the bar concededly do not benefit as directly from the bar as do employees from their union. But organized bars prefer a large measure of self-regulation instead of regulation by a governmental body with little or no connection to the profession. The integrated-bar gives unique, weighty professional advice to the California Supreme Court on admission to practice, rules of professional conduct, changes in procedural law; and, the bar administers the admission examination. In return for this unique status of attorneys admitted to practice, attorneys pay their share of this professional involvement. *Id.* at 5, 12.

Free riding could occur absent mandatory dues because the exclusivity in these contexts necessarily results in direct receipt of significant benefits. Here, no conferral of benefit from compelled advertising is evidenced. As shown above,

custody of attorney general if default for failure to pay fines). USDA brings collection actions for unpaid assessments. App. 32a. Requiring objectors to defend federal collection actions and bring equitable actions for recovery of monies is not consistent with the procedural safeguards the Court has required under the *Abood* rubric.

[33] Integrated-bar recommended rules restrict attorney advertising, See, e.g., Cal. Rules of Prof. Conduct, Rule 1-400, and only the certified bargaining representative can bargain for employees covered by a union.

compelled advertising does not achieve any of the purported aims; and instead, harms respondents rather than benefitting them. Even under the best of circumstances, not present here, conferral of a benefit from compelled advertising to those assessed will always be speculative. Equating any speculative benefit from compelled "generic" advertising with the concrete, fundamental benefits directly flowing from collective bargaining and integrated-bar activities is insupportable.

Application of the germaneness test the Secretary urges reveals the complete failure of compelled advertising to pass muster.[34] Compelled advertising is not germane to orderly marketing or the Secretary's identified interests in enhancing grower returns and increasing overall demand. Orderly marketing is not fostered by promotion of select varieties with the admitted committee aim of reducing the market for fruit from other stone fruit producing states. Overall market demand is not increased by promoting select varieties, it seeks only to enhance returns for select growers. Compelled advertising is the inverse of what occurs in union and integrated bar situations. Union expenditures are germane to the purpose of collective bargaining the closer they are to inuring benefit to the particular bargaining unit of the dissenting employees. *See, Lehnert*, 500 U.S. at 520 (where challenged lobbying expenses relate not to ratification of dissenter's collective bargaining agreement, but to support of profession generally, connection to function as bargaining representative too attenuated). The integrated bar benefits all members equally without focusing on particular clusters

[34] The Secretary argues that forced advertising need not have efficacy to be constitutional. Pet Brf. 30. This explains the shift in the government's argument presented to the Appellate Court from the *Central Hudson* test to the *Abood* test it now advances since the record evidence shows compelled advertising does not achieve the government's asserted goals.

of members. The compelled advertising at issue here seeks to benefit particular growers and handlers by pushing select, discrete varieties. Under the germaneness test, the Secretary's reasoning leads to the untenable conclusion that the State Bar could use dues to pay for advertising the top 15 law firms or other select attorneys or firms the way the committees advertise the top selling 15 fruit varieties and other discrete varieties.

Compelled advertising is also impermissible under the germaneness standard when it makes expansion a driving force behind the statutory scheme. A union, for example, cannot constitutionally force its members to pay for organizing efforts aimed to gain more union members or expand overall union power. *Ellis*, 466 U.S. p. 452-453. Similarly, the AMAA was not intended to control production as the Secretary would do by attempting to force an increase in demand.

Finally, compelled advertising significantly adds to the burden on speech inherent in allowing marketing orders — indeed, the significance of the burden comes from compelled advertising, not maturity and size regulations. In this sense, compelled advertising impales itself squarely on the final prong of the germaneness test by significantly adding to any existing burden on First Amendment rights inherent in allowing the marketing order at all. *See, e.g, Lehnert*, 500 U.S. at 519. The Secretary unpersuasively tries to minimize the burden by arguing that the purpose for which the assessments are spent is relevant, but that extraction of the assessments itself is constitutionally irrelevant. Pet. Brf. 21. As noted above, this reasoning ignores that compelled advertising impels respondents to alter their speech. But apart from altering respondents' speech, respondents' ability to engage in their own advertising at all is *directly* diminished by the government's diversion of respondents' monies to fund the compelled program. The purposes for which the

extracted assessments are used makes the corresponding burden on the ability to engage in the same protected expression relevant. *See, Elrod*, 427 U.S. at 355 (plurality) (cost of patronage restrains freedoms of belief and association — public employee not in financial position to support his own political party and party for which patronage requires contributions to keep job, so individual's ability to act and associate with others of his political persuasion is constrained and support for own party diminished); *U.S. v. National Treasury Union*, 115 S.Ct. 1003, 1014 (1995) (regulation prohibiting federal employees from receiving money for speeches imposed significant burden on expressive activity).

Wileman/Kash are each required to contribute $50,000 and more in each harvest season to support compelled advertising. App. 18a. As the Ninth Circuit found, this is a significant amount of money impacting respondents' ability to engage in their own protected speech. App. 18a; See, JA 749. Testimony at hearing confirmed that respondent Gerawan Farming, Inc. averages between $600,000 and $700,000 in assessments each harvest season — of which in excess of 50 percent goes to fund compelled advertising. Opp. 355a; JA 564. Cumulatively, respondents pay well over a million dollars in assessments each harvest season. As a result, promotional material respondents otherwise would prefer to create and distribute is substantially curtailed, their ability to project the message they desire necessarily becomes less attainable, and they are severely restricted from engaging in the advertising or promotion that will reach listeners' eyes and ears. Opp. 364a, 369a-372a.

It is constitutionally impermissible under the germanenesss test to require respondents to "donate" in excess of a million dollars each harvest season to finance an advertising program directed at improving their competitors' sales.

CONCLUSION

The text of the First Amendment does not provide a touchstone for discerning a reason why commercial speech can be manipulated as in this case by government-backed coercive power more readily than noncommercial speech. No historical tradition exists for such a notion.[35] Compelled advertising represents invidious, impermissible intrusion into the free flow of vital commercial information protected by the First Amendment. The Ninth Circuit's decision should be affirmed.

Respectfully submitted

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[35] *See,* brief of *amicus curiae* American Advertising Federation, Amercian Association of Advertising Agencies Magazine Publishers of America, and Direct Marketing Association in support of respondents.